Supreme Court, U.S.
FILED
96 367 SEP 3 1996
OFFICE OF THE CLERK

NO._____

In the
Supreme Court of the United States

OCTOBER TERM, 1996

D. J. (BUD) WHITE,

Petitioner,

v.

RUSH HEALTH SYSTEMS, INC.

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth District

---

PETITION FOR WRIT OF CERTIORARI

Clant M. Seay
P.O. Box 747
Kosciusko, MS 39090
(601) 289-1091
Counsel of Record

Michael J. Brown
5175 Galaxie Drive
Jackson, MS 39206
(601) 362-3878
Attorney for Petitioner

34 pp

QUESTIONS PRESENTED

1. The U.S. Supreme Court should grant Petitioner's Writ of Certiorari in order to resolve the current conflicts that exist among the 5th, 2nd, 10th, 9th, 4th, 1st, 7th, and 6th Court of Appeal of the United States as represented by the vaying, differing and conflicting standards for constructive discharge under Age Discrimination in Employment Act, 29 U.S.C. 621 et seq. (ADEA) presently being followed by those respective Courts; and to correct the error by the Fifth Circuit Court of Appeals by failing to follow its guidelines set out in Barrow v. New Orleans S. S. Ass'n. 10 F.3d 292, 297 (5th Cir. 1994), in reaching its conclusion in the subject case which upheld the erroneous conclusion of the U. S. District Court. Petitioner was denied his day in Court before a jury of his peers on the issue of his constructive discharge by his employer due to his age.

2. Whether the Circuit Court fundamentally altered the requirements of proof in a showing of constructive discharge in holding that the petitioner failed to make out a prima facie case.

LIST OF PARTIES

The parties to the proceeding below were the petitioner D.J. (Bud) White. The respondent before this Court is Rush Health Systems, Inc.[1]

---

[1] Rush Health Systems, Inc. is the parent company of Rush Foundation Hospital which was one of the original defendants in this matter which was dismissed by a lower court ruling. The lower Court also dismissed as individual in this matter the following parties: James C. McElroy, Jr., President of Rush Health Systems, Inc.; Wallace Strickland, Administrator, Rush Foundation Hospital; Timothy H. Moore, Personnel Director, Rush Foundation Hospital; Darrell Wildman, Chief Financial Officer, Rush Foundation Hospital; Rick Beasley, Material Manager, Rush Foundation Hospital.

TABLE OF CONTENTS

Page

Questions i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Statement of Jurisdiction 1

Statute Involved 1

Statement of the Case 2

Reasons for Granting the Writ 5

1. The U.S. Supreme Court should grant Petitioner's Writ of Certiorari in order to resolve the current conflicts that exist among the 5th, 2nd, 10th, 9th, 4th, 1st, 7th, and 6th Court of Appeal of the United States as represented by the vaying, differing and conflicting standards for constructive discharge under Age Discrimination in Employment Act, 29 U.S.C. 621 et seq. (ADEA) presently being followed by those respective Courts; and to correct the error by the Fifth Circuit Court of Appeals by failing to follow its guidelines set out in Barrow v. New Orleans S. S. Ass'n. 10 F.3d 292, 297 (5th Cir. 1994), in reaching its conclusion in the subject case which upheld the erroneous conclusion of the U. S. District Court. Petitioner was denied his day in Court before a jury of his peers on the issue of his constructive discharge by his employer due to his age. 5

2. Whether the Circuit Court fundamentally altered the requirements of proof in a showing of constructive discharge in holding that the petitioner failed to make out a prima facie case. 10

Conclusion 12

TABLE OF AUTHORITIES

Cases: Pages:

Acrey v. American Sheep Industry Ass'n, 981 F.2d 1569 (10th Cir. 1992) 7

Alicea Rosado v. Garcia Santiago, 562 F.2d 114 (1st Cir. 1977). 8

Barrow v. New Orleans S.S. Ass'n, 10 F.3d 292 (5th. Cir.1994) . . . . . i, iii, 5, 6, 10,11

Brooms v. regal Tube Co., 881 F.2d 412 (7th Cir.1988) 10

Calhoun v. Acme Cleveland Corp., 798 F.2d 559 (1st Cir.1986) 8

Clowes v. Allegheny Valley Hospital, 991F. 2d 1159 (3rd Cir.1993) 9

Darnell v. Target Stores, 16 F.3d 174 (7th Cir.1994) 9

Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1986) 7

Greenberg v. Union Camp Corp., 48 F.3d 22 (1st Cir. 1995) 8

Held v. Gulf Oil Co., 684 F.2d 427 (6th Cir. 1982) 10

Contents

Pages:

Hukkanen v. International Union of Operating Eng'r, 3 F.3d 281 (8th Cir.1993) 6

Martin v. Citibank, N.A., 762 F.2d 212 (2nd Cir. 1985) 9

Meyer v. Brown & Root Construction Co., 661 F.2d 369 (5th Cir.1981) 9

Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668 (7th Cir.1993) 9

Schnidrig v. Columbia Machine, Inc., 80 F.3d 1406 (9th Cir.1996) 7

Shealy v. Winston, 929 F.2d 1009 (4th. Cir.1991) 8

Smith v. World Ins. Co., 38 F.3d 1456 (8th Cir. 1994) 6

Spence v. Maryland Cas. Co., 995 F.2d 1147 (2nd. Cir. 1993) 9

Steiner v. Showboat Operating Co., 25 F.3 1459 (9th Cir.1994). 7

Thomas v. Douglas, 877 F.2d 1428 (9th Cir.1989) 8

Contents

Pages:

Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510 (6th Cir.1991) 10

Yates v. Avco Corp., 819 F.2d 630 (6th Cir.1987) 10

STATUTES AND REGULATIONS

Pages:

28 U.S.C. § 1254 (1) 1

29 U.S.C. § 621 ..... 1, 2, 5

29 U.S.C. § 623 1

STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals entered its judgment on May 9, 1996. App. 3a. This opinion was not published. The Petitioner moved for rehearing en banc within the allowable time. The Fifth Circuit Court of Appeals entered a order treating this request as both a petition for panel rehearing and as a petition for rehearing en banc; both were denied. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

This case involves the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, which provides in pertinent parts as follows:

> **§ 623. Prohibition of age discrimination**
>
> **(a) Employer practices.** It shall be unlawful for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

STATEMENT OF THE CASE

A. The Proceedings Below

This action was filed by petitioner, D.J. (Bud) White ("White"), in the United States District Court for the Southern District of Mississippi Eastern Division on June 27, 1994. The complaint alleged that Mr. White was forced to retire (constructively discharged) from his place of employment because of his age, in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. sections 621 et seq. ("ADEA"). App. 10a.

The petitioner further filed a Notice of Request and Demand for a Jury Trial on July 5, 1994.

The defendants, Rush Health Systems, Inc., et al, ("Rush"), respondent here, filed their motion for summary judgment on April 24, 1995

The District Court granted Rush's motion for summary judgment with a Memorandum Opinion and Order on July 7, 1995. App. 9a.

The District Court entered a Final Judgment in this matter on July 14, 1995. App. 7a.

White filed his notice to appeal to United States Court of Appeals for the Fifth Circuit on August 4, 1995. App. 5a.

Oral arguments on this case were heard before a panel of judges from the Fifth Circuit on April 29, 1996.

The United States Court of Appeals for the Fifth Circuit issued a written opinion affirming the District's Court opinion on May 9, 1996. App. 3a.

The United States Court of Appeals for the Fifth Circuit denied petitioners request on June 5, 1996 for the matter to be reheard on a suggestion for rehearing en banc. App. 1a. This petition for a writ of certiorari follows.

B. Statement of the Facts

The Petitioner was sixty-five (65) years when he was forced into retirement by the actions of the respondent. He had been employed at Rush Foundation Hospital from 1965 and at the time of his forced retirement his job title was called purchasing manager.

During the time in which the petitioner's responsibilities were being taken away, a so called new position of materials manager was created by respondent's management team. This position was filed by Rick Beasley age thirty-seven (37) years old. App. 10a.

After Beasley took over petitioner's responsibilities as a supervisor, he immediately started to take all of petitioner's work responsibilities away.

Cosondra Moffett stated in her depositional testimony "That Mr. Beasley offered me and Monica Vance the positions of Office Manager and Warehouse Manager in effect to completely phase out and replace Mr. D.J. (Bud) White at R.F.H.. Mr. Beasley would retain the position and responsibilities of being the purchasing agent for R.F.H.."

Monica Vance stated in her depositional testimony that Rick Beasley had no additional duties or job functions then the petitioner. Mr. Beasley had taken over the petitioner's job.

The petitioner was also denied computer training on the new computer system that was being installed into his department. Rush employee Cosondra Moffett stated in her testimony that:

> [t]o my knowledge Mr. White was never offered computer training on the new computer system that was being installed in the purchasing department. Myself and other office employees in the purchasing department at R.F.H. were offered computer training. Mr. White came to me. I showed him how to work it. ... The Owen people

> who installed the new computer system at the *hospital, from the start treated Mr.* White with no respect and treated him like he was a nobody.

Further Rush employee Kristi Lanterman stated in her depositional testimony:

> [t]o my knowledge Mr. White was never offered computer training on the new computer system that was being installed in the purchasing department. Ann Murphy from Owen stated that they were not going to waste time trying to teach him how to use the new system. She made the statement that Bud would be leaving soon.

The petitioner had no choice in the matter involving his job. He tried to hold onto it as long as possible, however, the facts are he was being out do to his age.

The petitioner went to the EEOC office in Jackson, Mississippi on January 17, 1994 and filed his affidavit alleging Age Discrimination in violation of ADEA. The EEOC issued D.J. White a right to sue letter on March 3, 1994. The petitioner filed his Complaint on June 27, 1994.

REASONS FOR GRANTING THE WRIT

1. The U.S. Supreme Court should grant Petitioner's Writ of Certiorari in order to resolve the current conflicts that exist among the 5th, 8th, 2nd, 10th, 9th, 4th, 1st, 7th, and 6th Courts of Appeal of the United States as represented by the vaying, differing and conflicting standards for constructive discharge under Age Discrimination in Employment Act, 29 U.S.C. 621 et seq. (ADEA) presently being followed by those respective Courts; and to correct the error by the Fifth Circuit Court of Appeals by failing to follow its guidelines set out in Barrow v. New Orleans S. S. Ass'n. 10 F.3d 292, 297 (5th Cir. 1994), in reaching its conclusion in the subject case which upheld the erroneous conclusion of the U. S. District Court. As a result, the Petitioner was denied his day in Court before a jury of his peers on the issue of his constructive discharge by his employer due to his age.

This Petition for Writ of Certiorari shows the respective Circuit Courts of Appeal all differ in the definition of what is or is not constructive discharge under ADEA with the exception of Fifth Circuit Court of Appeals. Throughout the other Circuits of the United States there is no standard to determine what is or is not constructive discharge other than the "reasonable persons standard", which is interpreted differently by the various Circuit Courts of Appeal.

The Fifth Circuit Court of Appeals in Barrow v. New Orleans S. S. Ass'n. 10 F.3d 292, 297 (5th Cir. 1994), set out seven factors to be considered by a Court in determining whether or not a prima facie case re constructive discharge is established.

Then the Fifth Circuit Court of Appeals in the present case failed to follow its criteria for constructive discharge is set out in the Barrow case. The seven factors to be considered by a Court in determining whether a prima facie case of constructive discharge

exists under the ADEA, which factors are to be considered singly or in combinations:

(1) demotion;
(2) reduction in salary;
(3) reduction in job responsibilities;
(4) reassignment to menial or degrading work;
(5) reassignment to work under a younger supervisor;
(6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or
(7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not.

The Fifth Circuit Court of Appeals did not follow its' own criteria. As a result, the Fifth Circuit Court of Appeals is not in harmony with itself and a conflict exists that only this Court can address.

There is no standard to decide what is and what is not constructive discharge among the other circuit courts. The so called standard is the "reasonable persons standard".

However, this "reasonable person standard" varies on what circuit your suit arises.

The Eighth Circuit Court of Appeals stated in Smith v. World Ins. Co., 38 F.3d 1456, 1461 (8th Cir. 1994), citing Hukkanen v. International Union of Operating Eng'r, 3 F.3d 281, 285 (8th Cir.1993):

> [T]he plaintiff must also show that the employer created the intolerable condition intending to force the plaintiff to quit. Id. The plaintiff can satisfy the intent requirement by demonstrating that he or she quit as "a reasonable foreseeable consequence of {the} employer{'s} discriminatory actions." Hukkanen v. International Union of Operating Eng'r, 3 F.3d 281, 185 (8th Cir. 1993).

Therefore under the Eighth Circuit Court's interpretation, it would be the "reasonably foreseeable consequence" standard.

The Tenth Circuit Court of Appeals set it's standard to prove constructive discharge in the case of Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986), cited in Acrey v. American Sheep Industry Ass'n, 981 F.2d 1569, 1573, 1574 (10th Cir. 1992) :

> [W]e have defined the standard for constructive discharge as whether the employer's illegal discriminatory acts fostered a climate in the workplace that would compel a reasonable person to resign. Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986).

The Court in Acrey at 1574, further stated that although the plaintiff in this case had stated that her resignation was tendered because "she was `too tired' to fight", she had "presented sufficient evidence to support the jury's determination that she was constructively discharged."

Therefore under the Tenth Circuit Court of Appeals the standard would be a modest "reasonable person standard".

The Ninth Circuit Court of Appeals restated its' standard for constructive discharged in Schnidrig v. Columbia Machine, Inc., 80 F.3d 1406, 1411 (9th Cir.1996), citing Steiner v. Showboat Operating Co., 25 F.3 1459, 1465 (9th Cir.1994), (quoting Thomas v. Douglas, 877 F.2d 1428, 1434 (9th Cir.1989)), when the Court stated:

> [T]o establish a claim for constructive discharge, Schnidrig "must show there are triable issues of fact as to whether 'a reasonable person in [his] position would have felt that [he] was forced to quit because of intolerable and discriminatory conditions.'" Steiner v. Showboat Operating Co., 25 F.3d 1459, 1465 (9th Cir. 1994), (quoting

> Thomas v. Douglas, 877 F.2d 1428, 1434 (9th Cir. 1989)).

Under the Ninth Circuit the plaintiff "must show triable issues of fact" and that the conditions must be both intolerable and discriminatory. Therefore this Circuit Court is not in harmony with the other circuit courts.

The Fourth Circuit Court of Appeals held in Shealy v. Winston, 929 F.2d 1009, 1013 (4th. Cir.1991), that:

> in order to establish a constructive discharge, the employee must show the deliberateness of the employer's actions and the intolerability of the working conditions.

Therefore the Fourth Circuit again has a standard not shared by the other Circuits and there exists a need by this Court to deliver a unified standard on what constitutes "Constructive Discharge".

The First Circuit Court of Appeals restated its constructive discharge standard in Greenberg v. Union Camp Corp., 48 F.3d 22, 27 (1st Cir. 1995) when it stated:

> to establish a claim of constructive discharge, the evidence must support a finding that "`the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 561 (1st Cir.1986) (quoting Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977)).

The standard for the First Circuit is the "reasonable person standard"; but what constitutes a reasonable person in connection with constructive discharge when there are no guideline factors to

follow. The factors for which the reasonable person should be guided, needs to be delivered by this Court.

The Second Circuit Court of Appeals stated in Spence v. Maryland Cas. Co., 995 F.2d 1147, 1156 (2nd. Cir. 1993) that:

> a constructive discharge cannot be proven merely by evidence that an employee disagreed with the employer's criticisms of the quality of his work, or did not receive a raise, or preferred not to continue working for that employer. Nor is the test merely whether the employee's working conditions were difficult or unpleasant. See, e.g., id.; Clowes v. Allegheny Valley Hospital, 991F. 2d 1159, 1162 (3rd Cir.1993); cf.Martin v. Citibank, N.A., 762 F.2d 212, 221 (2nd Cir. 1985).

Further the Court in Spence at 1156, stated that:

> [A] constructive discharge may be found on the basis of evidence that an employer deliberately sought to place an employee in a position that jeopardized his or her health. See, e.g., Meyer v. Brown & Root Construction Co., 661 F.2d 369, 371-72 (5th Cir.1981).

Therefore the Second Circuit has established certain factors that allow for the trier of fact to find for a plaintiff in a case of constructive discharge. However its overall standard to determine what constitutes constructive discharge is still rather vague at best.

The Seventh Circuit Court of Appeals has restated its standard for constructive discharge in the case of Darnell v. Target Stores, 16 F.3d 174, 177 (7th Cir.1994) where the Court stated that:

> [D]emonstrating constructive discharge requires a showing that a "reasonable employee would have felt compelled to resign under the circumstances of the case." Rodgers v. Western-Southern Life Ins. Co., 12

F.3d 668, 677 (7th Cir.1993) (citing Brooms v. regal Tube Co., 881 F.2d 412, 423 (7th Cir.1988).

The Sixth Circuit Court of Appeals stated in Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510, 515 (6th Cir.1991) what its standard is for the proof of constructive discharge as being:

> "so difficult or unpleasant that areasonable person in the employee's shoes would have felt compelled to resign". Yates v. Avco Corp., 819 F.2d 630, 636-37 (6th Cir.1987); Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982).

The Seventh and Sixth Circuit again places the trier of fact in a most difficult position on judging, without the guidance of factors, on what constitutes a standard to determine what is constructive discharge.

The Supreme Court should grant this Petition to reconcile a serious circuit conflict, and to provide needed coherence to an unsettled and vitally important area of the federal age discrimination law.

2. Whether the Circuit Court fundamentally altered the requirements of proof in a showing of constructive discharge in holding that the petitioner failed to make out a prima facie case.

The Petitioner made out a prima facie case of Age Discrimination under the ADEA. The Petitioner showed that he was constructively discharged under the standards and proof established by the Fifth Circuit Court of Appeals in Barrow v. New Orleans S.S. Ass'n, 10 F.3d 292, 297 (5th Cir.1994).

The Fifth Circuit Court of Appeals ruled in the Barrow case that seven factors should be used to consider whether a reasonable employee would feel compelled to resign [retire]. These factors are to be used singly or in combinations:

> (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or

> degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not.

The Petitioner showed that he could meet five of the seven factors with regards to the proof required under the Barrow standard. However the Circuit Court refused to follow the Barrow standard in a showing of what constitutes constructive discharge under the reasonable person standard.

Moreover, by the Circuit Court failing to follow the seven factors of Barrow or trying to distinguish the present case with Barrow, the Court has not maintained uniformity of its decisions.

Therefore the Fifth Circuit Court of Appeals is not in harmony with itself and a conflict exists that only this Court can address. Petitioner was denied his day in Court before a jury of his peers on the issue of constructive discharge by his employer due to his age.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of lower courts should be reversed.

Respectfully submitted,

Clant M. Seay
P.O. Box 747
Kosciusko, MS 39090
(601) 289-1091
Counsel of Record

Michael J. Brown
5175 Galaxie Drive
Jackson, MS 39206
(601) 362-3878
Attorney for Petitioner

APPENDIX A- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JUNE 5, 1996

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 95-60487

D. J. (BUD) WHITE
PLAINTIFF - APPELLANT

V.

RUSH HEALTH SYSTEMS, INC., and its subsidiary; RUSH FOUNDATION HOSPITAL; JAMES C. MCELROY, JR., President of Rush Health Systems, Inc.; WALLACE STRICKLAND, Administrator, Rush Foundation Hospital; TIMOTHY H. MOORE, Personnel Director, Rush Foundation Hospital; DARRELL WILDMAN, Chief Financial Officer, Rush Foundation Hospital; RICK BEASLEY, Material Manager, Rush Foundation Hospital

DEFENDANTS - APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 05/09/96, 5 Cir., _____, _____ F.3d_____)

(June 05, 1996)

Before Circuit Judges:
GARWOOD, HIGGINGBOTHAM and BENAVIDES

PER CURIAM:

Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Clerk

APPENDIX B- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED MAY 9, 1996

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 95-60487

D. J. (BUD) WHITE
APPELLANT

V.

RUSH HEALTH SYSTEMS, INC., and its subsidiary; RUSH FOUNDATION HOSPITAL; JAMES C. MCELROY, JR., President of Rush Health Systems, Inc.; WALLACE STRICKLAND, Administrator, Rush Foundation Hospital; TIMOTHY H. MOORE, Personnel Director, Rush Foundation Hospital; DARRELL WILDMAN, Chief Financial Officer, Rush Foundation Hospital; RICK BEASLEY, Material Manager, Rush Foundation Hospital

APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
(4:94-CV-62-LN)

Before Circuit Judges:
GARWOOD, HIGGINGBOTHAM and BENAVIDES

PER CURIAM:*

In this age discrimination case, appellant, D. J. "Bud" White appeals from a summary judgment granted in favor of appellee Rush Health Systems, Inc. ("Rush") on the grounds that White failed to make a prima facie case of constructive discharge. We affirm.

White's lawsuit stems from events surrounding the computerization of Rush's purchasing department where White had been the purchasing agent. Following the decision to automate purchasing procedures, Rick Beasley, a thirty-seven year old employee, was assigned to head the department. White retained his title, but Beasley had the responsibility for automation. As a result of the computerization, many of White's old duties became obsolete. White asserts that Beasley took over or reassigned all of White's job functions leaving him with essentially nothing to do. Despite the transfer of job responsibilities, it is undisputed that White suffered no decrease in pay, benefits, or hours of employment. His job title did not change. He was never asked to resign or retire. On March 15, 1994, White met with the personnel director who explained to White his job duties post-computerization. Nonetheless, two days later, White, who had been an employee of Rush for twenty-eight years, resigned at the age of sixty-five.

White then sued Rush[1] alleging that he was constructively discharged on account of his age in violation of the Age Discrimination in Employment Act ("ADEA"). Rush moved for summary judgment on the basis that White failed to make a prima

---

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4

1 Rush also named several individual employees in the lawsuit. The district court dismissed the claim against the individual employees because they were not "employees" under the ADEA. White does not challenge this on appeal.

facie case of constructive discharge. The district court agreed; this appeal ensued.

We review a summary judgment under well-established standards. Blakeny v. Lomas Info Sys., Inc., 65 F.3d 482, 484 (5th Cir. 1995); see Sterling Property Management, Inc. v. Texas Commerce Bank, Nat'l Ass'n, 32 F.3d 964, 966 (5th Cir. 1994).

The district court properly denied White's ADEA claim because White failed to make a prima facie showing of constructive discharge. To establish a prima facie case of age discrimination, the plaintiff must initially establish that he was discharged. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 992 (5th Cir. 1996) (en banc). Because White was not actually discharged, he must show constructive discharge. Constructive discharge occurs when the working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to retire. McCann v. Litton Sys., Inc., 986 F.2d 946, 951 (5th Cir. 1993).

White cannot make a prima facie showing of constructive discharge on the summary judgment evidence presented. Accepting White's testimony as true, at most, White can only demonstrate that his job functions were given to other employees.[2] It is undisputed that he retained his job title, salary, benefits, and hours. Consequently, none of the usual inducia of a constructive discharge are present. See McKethan v. Texas Farm Bureau, 996 F.2d 734, 741 (5th Cir. 1993) (describing demotion, performance of inconsistent or more onerous duties, and reduced pay as usual factors surrounding constructive discharge), cert. denied, 114 S. Ct. 694 (1994). Being retained in a newly-created position "without a description and little in the way of job duties" does not reach the level of constructive discharge. See McCann, 986 F.2d at 949, 951-2; see also Jett v. Dallas Indep. Sch. Dist., 798 F.2d 748, 755 (5th Cir. 1986) (demotion of high school athletic director to a non-

---

[2] Rush hotly contests this issue contending that White still retained significant job functions.

coaching position did not establish constructive discharge), aff'd in part and rev'd in part on other grounds, 491 U.S. 701 (1989); Jurgens v. EEOC, 903 F.2d 386, 392 (5th Cir. 1990) (demotion, plus a pay-cut, and loss of supervisory duties did not amount to constructive discharge).

White also fails to demonstrate any additional aggravating factors to implicate constructive discharge. He was not forced to train his new supervisor. There is no summary judgment evidence that White was harassed about his retirement plans. Likewise, there is no summary judgment evidence that White was humiliated by his supervisors.[3] Furthermore, White did not pursue internal grievance procedures that we have counseled is necessary before resignation for constructive discharge. See McKethan, 996 F.2d at 741; Ugalde v. W. A. McKenzie Asphalt Co., 990 F.2d 239, 243 (5th Cir. 1993). Finally, we note that when asked in his deposition why he retired White did not articulate a forced a constructive discharge, but instead stated that he anticipated someone would eventually "get up enough nerve to tell me to go home permanently" and indicated his belief that once he sued the company he could not continue to work there. Under the particular circumstances, no reasonable employee would have felt compelled to resign. See Barrow v. New Orleans Steamship Ass'n, 10 F.3d 292, 297 (5th Cir. 1994).

The judgment of the district court is AFFIRMED.

---

[3] White's testimony is that he resigned because he had nothing to do. While one co-worker's affidavit includes a conclusory statement that Beasley "when possible, tried to put down and humiliate Mr. White," there is no summary judgment evidence that this was ever done in White's presence. As such, White could not have been influenced to resign by this alleged humiliation. See McKethan, 996 F.2d at 741 (holding that derogatory comments made at awards banquet in front of employee insufficient to show constructive discharge).

APPENDIX C - FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN OF MISSISSIPPI EASTERN DIVISION DATED JULY 17, 1995

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. 4:94-CV-62 (L) (N)

D. J. (BUD) WHITE,

Plaintiff,

v.

RUSH HEALTH SYSTEMS, INC.,
AND ITS SUBSIDIARY; RUSH
FOUNDATION HOSPITAL, ET AL

Defendant.

FINAL JUDGMENT

This cause came on for hearing on the motion of Defendant for summary judgment. After consideration of the motion, evidence offered in support of the motion, and the memoranda of the parties, the Court finds that the motion is well taken and should be granted. The Memorandum Opinion and Order of this Court filed July 7, 1995, and the Findings of Fact and Conclusions of Law included therein are incorporated herein by reference. For the reasons assigned in that Memorandum Opinion and Order, the Court concludes that judgment should be entered in favor of the Defendant

and against the Plaintiff and that the Defendant should be awarded its costs.

IT IS THEREFORE, ORDERED AND ADJUDGED that the complaint be, and it is hereby DISMISSED WITH PREJUDICE in accordance with this Court's Memorandum Opinion and Order at the cost of the Plaintiff.

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant is entitled to recover its taxable costs in this action upon filing a Bill of Costs in the time and manner prescribed.

SO ORDERED AND ADJUDGED, THIS THE 14th day of July, 1995.

/S/ TOM S. LEE
UNITED STATES DISTRICT JUDGE

APPENDIX D - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI FILED JULY 7, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CIVIL ACTION NO. 4:94CV62(L)(N)

D. J. "BUD" WHITE,

Plaintiff,

v.

RUSH HEALTH SYSTEMS, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

This cause is before the court on the summary judgment motion of all defendants. The court, having considered the motion, response, briefs and exhibits, concludes that defendants' motion should be granted.[4]

Plaintiff D. J. "Bud" White was employed by defendant Rush Foundation Hospital, a subsidiary of defendant Rush Health Systems, Inc. (together "Rush"), for approximately twenty-eight

---

[4] Defendants have also moved to strike portions of affidavits filed by plaintiff in his response to their motion for summary judgment. Because the court will grant defendants' motion for summary judgment, the motion to strike is rendered moot.

years. On March 7, 1994, at the age of sixty-five, he tendered his resignation to Rush and soon thereafter, upon receiving a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), filed this lawsuit alleging that he had been constructively discharged on account of his age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. Plaintiff's charge of age discrimination stems from a series of events associated with the computerization of Rush's purchasing department, where plaintiff worked. He contends that these events ultimately culminated in his constructive discharge.

Plaintiff was the purchasing agent at the hospital for a number of years, when, in the early 1990s, a determination was made to upgrade and automate purchasing procedures at the hospital. To facilitate the conversion, Rick Beasley, a thirty-seven year old, was transferred in to head the department. White retained the title of purchasing agent, but Beasley in fact took charge of the process of automating the department, and he continued to run the department once the automated systems were in place.[5] According to plaintiff, by September 1993, Beasley, in the newly-created position of materials manager for the purchasing department, had either taken over or otherwise reassigned all of the plaintiff's important job functions. Whereas plaintiff had once been responsible for supervising the department's employees, talking to sales representatives, negotiating prices and working with other department heads and physicians, Beasley assumed these duties. Additionally, Beasley placed Kristi Lanterman, hired after the computerized system was implemented, in charge of distributing supplies from inventory, a job function previously performed by plaintiff; Cossandra Moffett, who had been under plaintiff's

---

[5] Defendants have presented extensive evidence that White was uncooperative and even openly hostile to the process of computerizing the purchasing department. White disputes this claim and says that while he was not opposed to computerization, he did not approve of the particular system being installed.

supervision, took over plaintiff's duty of approving invoices, and Monica Vance, another new employee, began ordering, accounting and maintaining inventory, other functions that had been performed by plaintiff. Plaintiff and Vance shared an office and desk which plaintiff had previously had to himself. All of these changes left plaintiff with very little work or responsibility. Plaintiff testified, "I was left with nothing to do but opening the mail. Then it was given to Moffett also." Nevertheless, plaintiff also testified that he suffered no diminution in pay, benefits or hours of employment; nor did his job title change, rather Rick Beasley, as materials manager is alleged to have usurped all of White's authority and responsibility.[6] Finally, in March 1994, plaintiff resigned. He claims in this lawsuit that defendants' actions forced him into retirement, or in other words, that he was constructively discharged. And he claims that this occurred because of his age.

Initially, the court observes that in addition to Rush, plaintiff has named as defendants a number of his fellow Rush employees, most of whom occupied superior or supervisory positions,[7] who, along with Rush, are alleged to have caused, for

---

[6] For the purposes of this motion, the court has considered as true facts as presented by the non-moving party; however, the court notes that defendant has offered affidavit testimony that plaintiff retained significant duties in the purchasing department, and that as late as March 15, 1994, two days before White tendered his resignation, Timothy Moore, the hospital's personnel director, and Darrell Wildman, the Chief Financial Officer, met with White to assure him that, although the process of automation meant some functions would be performed differently, his responsibilities as purchasing agent would remain as they had been in the past.

[7] He alleges that these defendants, like Rush, discriminated against him because of his age in violation of the ADEA. As to the individual defendants, plaintiff does not allege that they committed any torts against him. Rather, he seems to have included them in the category of his "employer," alleging that he was "an employee of the Defendants as the term 'Defendants' is defined in the Age Discrimination in Employment Act, 29 U.S.C. 630(f), "which defines "employee." The court is unaware of any definition of "defendant" in the act.

discriminatory reasons, plaintiff's forced retirement. It is clear in this circuit that individual employees are not subject to suit under Title VII, which defines "employer" to mean "a person engaged in an industry affecting commerce who has fifteen or more employees. . . .and any agent of such a person. . . ." 42 U. S. C. § 20000e(b). Grant v. Lone Star Co., 21 F.3d 649 (5th Cir.), cert. denied, 115 S. Ct. 574 (1994). Rather, the phrase "agents of such a person" is included in the definition so that the actual employers may be held liable through respondeat superior for the acts of their agents. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 584 (9th Cir. 1993), cert. denied, 114 S. Ct. 1049 (1994). By analogy, this proposition holds true for the ADEA as well, which defines "employer" similarly as "a person engaged in an industry affecting commerce who has twenty or more employees. . . . The term also means (1) any agent of such a person . . . ." 29 U.S.C. § 630(b).[8] Accordingly, individual employees of Rush, named by plaintiff, are not employers under the ADEA and for that reason, are due to be dismissed. The court's further conclusion, applicable to all defendants, that plaintiff cannot establish the elements of his claim, also compels the conclusion that plaintiff's allegations as to the nearly total elimination of his job responsibilities and duties, plaintiff still cannot prevail since he cannot prove he was constructively discharged.

The court construes this statement by plaintiff as an allegation that all defendants were employers within the meaning of 29 U.S.C. § 630 (b).

[8] Moreover, the Fifth Circuit utilizes the same "hybrid economic realities/common law right of control test" to determine the existence of an employment relationship under Title VII and the ADEA, see Barrow v. New Orleans S. S. Ass'n, 932 F.2d 473 (5th Cir. 1991), and the standards governing the parties' burdens and the order of proof under both acts are analogous, see Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 n. 7 (5th Cir. 1993). Thus resolution of the issue of individual employees' exposure to suit under the ADEA should likewise be guided by Title VII principals.

To establish a prima facie case of age discrimination, the ADEA plaintiff must demonstrate (1) that he was actually or constructively discharged; (2) that he was qualified for the position; (3) that he was within the protected class at the time of discharge; (4) and that he was either (a) replaced by someone outside the protected class, (b) replaced by someone younger, or (c) otherwise discharged because of his age. See Bodenheimer v. PPG Indus. Inc., 5 F.3d 955, 957 (5th Cir. 1993); McCann v. Litton Sys., Inc., 5 F.2d 946, 950 (5th Cir. 1993). Here, it is undisputed that White was not actually discharged, but rather resigned; therefore, he must prove he was constructively discharged. The Fifth Circuit has said that "[c]onstructive discharge occurs when 'the working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to [retire].' " McCann, 986 F.2d at 951 (quoting Bourque v. Powell Electrical Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980)). The inquiry is not whether the employee in fact felt compelled to resign, but whether an objectively reasonable person would have been compelled to resign. Id.

In support of his constructive discharge claim, plaintiff has presented deposition testimony and affidavits of witnesses who state that Rick Beasley excluded him from department meetings and often stated to others--but not to the plaintiff--that he wished plaintiff would "go on and go home"; in other words, that he wished White would retire. However, even accepting as true that Beasley was "adamant" about plaintiff's retirement, but noting the absence of evidence that Beasley ever said anything in that vein to plaintiff himself, the court concludes this evidence is insufficient to support a finding of constructive discharge.

The burden to prove constructive discharge is a heavy one. The Fifth Circuit has considered numerous cases in which working conditions were far less than pleasant, but in which the court has nevertheless concluded that the correct path would have been for a would-be plaintiff to remain in his job and seek remedies in court, especially given the statutory protections against retaliatory

discharge. See e.g., Vaughn v. Pool Offshore Co., 683 F.2d 922 (5th Cir. 1982) (racially offensive work environment and extended working hours not constructive discharge); Jett v. Dallas Indep. School Dist., 798 F.2d 748 (5th Cir. 1986), modified on other grounds, 109 S. Ct. 2702 (1989) (demotion from head football coach at one high school to freshman coach at another not constructive discharge). In this regard, the parallels between this case and McCann v. Litton Systems, Inc., 986 F.2d 946 (5th Cir. 1993), are worth nothing. In McCann, the plaintiff, as White here, alleged that his employer forced him into retirement. McCann was sixty-seven years old and had been employed as an engineer by Litton for sixteen years. A thirty-three-year-old employee was transferred into a position very similar to McCann's. McCann testified that he intended to work until about age seventy, but that his employers "hounded" him with questions about his retirement plans and placed him in a new position with no job description and very few duties. Later, McCann was given the option, as part of a company-wide reduction in force, of either retiring or transferring to a new position with decreased pay under a much younger man and being "deprived of his secretary and subordinates." He chose to retire and filed suit charging constructive discharge. The Fifth Circuit held that these events, culminating in the prospect of a cut in pay and loss of supervisory responsibilities, did not amount to constructive discharge. Id. at 952. The court here likewise concludes that the facts shown by plaintiff will not support his claim.[9]

---

[9] Because plaintiff has not carried the burden of his prima facie case, the arguments of the parties regarding the issue of the availability of punitive damages under the ADEA are moot and will not be addressed.

For the foregoing reasons, the defendants' motion for summary is granted. A separate judgment will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this the 7th day of July, 1995.

/S/ TOM S. LEE
UNITED STATES DISTRICT JUDGE

(2)

No. 96-367

Supreme Court, U.S.
FILED
OCT 30 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

D.J. (BUD) WHITE,

Petitioner,

vs.

RUSH HEALTH SYSTEMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

KENNETH E. MILAM
Counsel of Record
WALTER J. BRAND
CHRISTOPHER B. BRADFORD
WATKINS & EAGER PLLC
Attorneys for Respondent
The Emporium Building
Suite 300
400 East Capitol Street
P.O. Box 650
Jackson, Mississippi 39205
(601) 948-6470

9838
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

17 pp

CORPORATE DISCLOSURE STATEMENT

Respondent Rush Health Systems, Inc. is a privately-held, nonprofit corporation. None of the affiliates or subsidiaries of Rush Health Systems, Inc. has issued shares to the public. All of Rush Health Systems, Inc.'s subsidiaries are wholly owned, except Specialized Management Services, which is a joint venture between Rush Service Company, Inc. (a wholly-owned subsidiary of Rush Health Systems, Inc.) and F.G. Riley Memorial Hospital.

TABLE OF CONTENTS

	Page
Corporate Disclosure Statement	i
Table of Contents	ii
Table of Citations	ii
Statement of the Case	1
A. Course of Proceedings and Disposition of the Case Below.	1
B. Correction of Misstatements in the Petition.	3
Reasons for Denying the Writ	6
I. Respondent was entitled to summary judgment under any circuit's standard for constructive discharge.	6
II. The opinion below did not violate Fifth Circuit precedent.	10
Conclusion	12

TABLE OF CITATIONS

Cases Cited:

Barrow v. New Orleans Steamship Ass'n, 10 F.3d 292 (5th Cir. 1994) 7, 10, 11

Contents

	Page
Blistein v. St. John's College, 74 F.3d 1459 (4th Cir. 1996)	7
Carter v. Ball, 33 F.3d 450 (4th Cir. 1994)	7
Darnell v. Target Stores, 16 F.3d 174 (7th Cir. 1994)	5, 7
Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1996)	7
Gray v. York Newspapers, Inc., 957 F.2d 1070 (3d Cir. 1992)	7, 8, 9
Greenberg v. Union Camp Corp., 48 F.3d 22 (1st Cir. 1995)	7
Jett v. Dallas Ind. School Dist., 798 F.2d 748 (5th Cir. 1986), *aff'd in part & rev'd in part on other grounds*, 491 U.S. 701 (1989)	8, 11
Kilgore v. Thompson & Brock Management, Inc., 93 F.3d 752 (11th Cir. 1996)	7, 10
McCann v. Litton Systems, Inc., 986 F.2d 946 (5th Cir. 1993)	8, 9, 11
McKethan v. Texas Farm Bureau, 996 F.2d 734 (5th Cir. 1993), *cert. denied*, 510 U.S. 1046 (1994)	9, 10
Pena v. Battleboro Retreat, 702 F.2d 322 (2d Cir. 1983)	8

Contents

Page

Schnidrig v. Columbia Machine, Inc., 80 F.3d 1406 (9th Cir. 1996), *cert. denied*, __ S. Ct. __, 65 USLW 3085 (Oct. 15, 1996) 7

Simpson v. Federal Mine Safety & Health Review Comm'n, 842 F.2d 453 (D.C. Cir. 1988) 7

Smith v. World Ins. Co., 38 F.3d 1456 (8th Cir. 1994) ... 7

Spence v. Maryland Casualty Co., 995 F.2d 1147 (2d Cir. 1993) 7

Stetson v. NYNEX Service Co., 995 F.2d 355 (2d Cir. 1993) 8

Tidwell v. Meyer's Bakeries, Inc., 93 F.3d 490 (8th Cir. 1994) 10

Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510 (6th Cir. 1991) 7

Statute Cited:

29 U.S.C. § 621, *et seq.* 6

Rule Cited:

Supreme Court Rule 15.1 3

Respondent, Rush Health Systems, Inc., respectfully requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the Fifth Circuit Court of Appeals. The court of appeals' opinion is unpublished, but is reprinted as appendix B to the petition. (For convenience of the Court, all citations to the opinion will be to the petition's appendix).

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for writ of certiorari. Despite petitioner's claim of a conflict among the circuits, all circuits apply the same standard for constructive discharge, which requires proof of working conditions so intolerable that a reasonable person would have been compelled to resign. It is undisputed in this case that petitioner suffered no cut in pay or hours or loss of title and that the only change in working conditions was a realignment in his work duties which was caused by the computerization of his department. No court has held that a change in work duties alone amounts to constructive discharge.

A. Course of Proceedings and Disposition of the Case Below.

Respondent operates a large hospital in Meridian, Mississippi. Petitioner worked for respondent for twenty-eight years, the last several years as purchasing agent. On March 17, 1994, he retired. He was 65 years old.

The summer before petitioner's retirement, respondent began converting its manual purchasing and inventory system to a computerized system. Computerization significantly affected the job duties of everyone in the purchasing department and it specifically eliminated many of the manual

tasks petitioner had performed for years. A new position, materials manager, was created to supervise and coordinate the newly computerized purchasing and inventory system. Petitioner was not qualified for the job, nor did he seek it. Rick Beasley was transferred into the new position.

Petitioner openly opposed the computerization and complained that his job duties were being cut. Respondent's president assured him a month before his retirement that he wanted him to continue working as long as he chose to do so. On March 15, 1994, respondent's human resources manager and chief financial officer met with petitioner and presented him with a written list of duties that they expected him to perform in the future. Instead, the petitioner chose to ignore his new duties without even attempting to perform them, and filed an EEOC charge; he retired only two days later.

Petitioner filed this case in the United States District Court for the Southern District of Mississippi, Jackson Division against respondent, as well as several officers and employees of respondent. He claimed that he was constructively discharged on account of his age. Following discovery, respondent moved for summary judgment on the ground that there was no evidence that petitioner was constructively discharged.

The district court granted summary judgment on the issue of constructive discharge. (Pet. App. at 13a-14a). The district court also dismissed petitioner's claim against the individual defendants. (Pet. App. at 12a).

The Court of Appeals for the Fifth Circuit affirmed. It likewise noted that petitioner could not show constructive discharge on the evidence presented: "Accepting [petitioner's] testimony as true, at most, [petitioner] can only demonstrate that his job functions were given to other employees. It is

undisputed that he retained his job title, salary, benefits, and hours. Consequently, none of the usual indicia of a constructive discharge are present." (Pet. App. at 5a). The court of appeals further held that petitioner failed to pursue internal grievance procedures that are a prerequisite to resigning for constructive discharge. (Pet. App. at 6a). Petitioner did not appeal the dismissal of the individual defendants.

Petitioner subsequently filed a suggestion for rehearing en banc. That suggestion was denied without opinion. (Pet. App. at 2a).

B. Correction of Misstatements in the Petition.

The opinion of the court of appeals correctly summarizes the facts of the case and the evidence presented on respondent's motion for summary judgment. In the interest of brevity, respondent directs the Court to the appellate court opinion.

Pursuant to United States Supreme Court Rule 15.1, respondent brings the following misstatements of fact to the Court's attention.

Petitioner states that respondent forced him into retirement. (Petition at 3-4). This, of course, is the ultimate claim in issue, and a claim that the evidence sharply undercuts. Petitioner was repeatedly asked at his deposition what working conditions forced him to retire. The only condition he identified was an alleged reduction in his work duties. It is undisputed that petitioner was never asked to retire; he was not even questioned about his retirement plans. He suffered no loss of pay or benefits. His hours were not cut. He experienced no loss of rank or title. The courts below relied on these undisputed facts in rejecting his claim of forced retirement.

In fact, petitioner even undercut his own claim that his resignation was due to the change in his work duties. When questioned at his deposition about the EEOC charge he filed before resigning, he testified that his resignation had less to do with his working conditions than his unsupported belief that resigning was a prerequisite to suing his employer:

> Q. But nobody told you to walk, did they?
>
> A. Well, I know I can't sue a company and continue to work there.
>
> Q. But you did continue to work there. Nobody told you to quit, did they?
>
> A. No, but I knew I couldn't stay any longer because the process was running its course; and it was a matter of time when I entered the letter into court that I'd have had to have quit.
>
> Q. Well, is that what you meant by the wording in your resignation that — I think you said something about "due to the EEOC actions"?
>
> A. Correct.
>
> Q. And you felt since you had filed this charge that you were forced to quit?
>
> A. I would be, yes.
>
> Q. But you were speculating. Nobody told you you had to quit.

A. Well, I think the sun's out there too. That's speculation.

Q. Well, but I—

A. Nobody told me anything to my face about anything.

The only other evidence the petition mentions is respondent's alleged failure to train him on the new computer system. Petitioner quotes two affidavits to support this claim. (Petition at 3-4). There were two reasons these affidavits did not defeat summary judgment. First, petitioner never testified that the lack of computer training had anything to do with his decision to retire; at his deposition, he blamed his decision to retire on the alleged reduction in his work duties and his belief that resigning was a prerequisite to a lawsuit.

Second, one of the affiants, Cossondra Moffett, recanted her affidavit testimony at her deposition. Although she stated in her affidavit that petitioner was denied computer training, she confessed at her deposition that she had actually trained him on the computer system herself. She further testified that this training taught him all he needed to know about the computer system to perform his job. In light of Ms. Moffett's admissions at her deposition, petitioner's affidavits did not constitute competent summary judgment evidence. *See Darnell v. Target Stores*, 16 F.3d 174, 177 (7th Cir. 1994) (affidavit contradicted by subsequent deposition testimony does not create an issue of fact).

REASONS FOR DENYING THE WRIT

I.

RESPONDENT WAS ENTITLED TO SUMMARY JUDGMENT UNDER ANY CIRCUIT'S STANDARD FOR CONSTRUCTIVE DISCHARGE.

Petitioner claims respondent terminated him in violation of the Age Discrimination and Employment Act of 1967, 29 U.S.C. § 621, *et seq*. Since petitioner has never contended that respondent actually discharged him, he had to show that respondent constructively discharged him. The district court and court of appeals held that petitioner did not create a genuine issue of fact on the issue of constructive discharge.

Petitioner's claim of constructive discharge boils down to one claim: That respondent forced him into retirement by reducing his work duties. Petitioner was repeatedly asked at his deposition to identify the conditions he claims forced him to quit. Aside from his mistaken belief that his lawsuit against respondent required his resignation, the only condition petitioner could identify was the alleged reduction in his work duties during and after the computerization of the purchasing system. He suffered no cut in pay or hours. He suffered no change in title, rank or position. He was not demoted. He was not asked to retire or even questioned about his retirement plans. There is no evidence that his work performance was criticized. Finally, petitioner offered no evidence that he was qualified for, or that he even sought, the position of materials manager, the position created to supervise the newly computerized purchasing system.

The district court and court of appeals held that petitioner's allegations do not establish a constructive discharge. Despite

petitioner's claim of a conflict among the lower circuits, respondent would have received summary judgment in any circuit. The circuits have unanimously embraced an objective standard of intolerable working conditions in constructive discharge cases. Specifically, an employee must prove that working conditions were so intolerable that a reasonable employee would have felt compelled to resign.[1] *Greenberg v. Union Camp Corp.*, 48 F.3d 22, 27 (1st Cir. 1995); *Spence v. Maryland Casualty Co.*, 995 F.2d 1147, 1156 (2d Cir. 1993); *Gray v. York Newspapers, Inc.*, 957 F.2d 1070 (3d Cir. 1992); *Blistein v. St. John's College*, 74 F.3d 1459, 1468 (4th Cir. 1996); *Barrow v. New Orleans Steamship Ass'n.*, 10 F.3d 292, 297 (5th Cir. 1994); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 515 (6th Cir. 1991); *Darnell v. Target Stores*, 16 F.3d 174, 177 (7th Cir. 1994); *Smith v. World Ins. Co.*, 38 F.3d 1456, 1460 (8th Cir. 1994); *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1411 (9th Cir. 1996), *cert. denied*, __ S. Ct. __, 65 USLW 3085 (Oct. 15, 1996) (No. 96-70); *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986); *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752 (11th Cir. 1996); *Simpson v. Federal Mine Safety & Health Review Comm'n*, 842 F.2d 453 (D.C. Cir. 1988). Petitioner's evidence did not amount to the creation of intolerable working conditions, no matter how interpreted.

A mere change in work duties does not create intolerable working conditions that would compel a reasonable person to resign. *See Carter v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994)

---

1. Some circuits also appear to require the employee to offer evidence that the employer imposed the intolerable conditions in a deliberate attempt to force the employee to resign. *E.g., Spence v. Maryland Casualty Co.*, 995 F.2d 1147, 1156 (2d Cir. 1993). The Fifth Circuit does not require proof of specific intent and the court below did not require petitioner to offer such evidence. This purported conflict is thus immaterial to the decision of petitioner's case.

(dissatisfaction with work assignments no basis for constructive discharge); *Stetson v. NYNEX Service Co.*, 995 F.2d 355, 360 (2d Cir. 1993) ("A constructive discharge generally cannot be established, however, simply through evidence that an employee was dissatisfied with the nature of his assignments."). *See also Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1082 (3d Cir. 1992) (proposed reassignment of reporter from courthouse beat to "demeaning" general reporting assignment not constructive discharge, especially since proposed reassignment involved no loss of pay or change in title); *Jett v. Dallas Ind. School Dist.*, 798 F.2d 748, 755 (5th Cir. 1986), *aff'd in part & rev'd in part on other grounds*, 491 U.S. 701 (1989) (coach stripped of coaching responsibilities and reassigned to another school not constructively discharged).

Two courts have squarely rejected the claim that a reduction in duties — even a substantial reduction — creates objectively intolerable working conditions. In *Pena v. Battleboro Retreat*, 702 F.2d 322 (2d Cir. 1983), the Second Circuit reversed a jury verdict for the plaintiff in an ADEA case. The plaintiff announced her retirement plans a year in advance. The defendant hired a younger replacement and transferred virtually all of the plaintiff's duties to the replacement. The plaintiff contended this left her with too little to do and quit before her planned retirement. The Second Circuit held that these were not intolerable working conditions, pointedly noting that the plaintiff suffered no loss of pay or change in title. *Id.* at 325.

In *McCann v. Litton Systems, Inc.*, 986 F.2d 946 (5th Cir. 1993), the Fifth Circuit rejected the plaintiff's claim that he was constructively discharged when he retired from his senior engineering position. Management had given him the option of either retiring or transferring to a new position under a much

younger man. The plaintiff alleged that the new position was not well-defined, that he would be left with little to do, and that he would be deprived of his secretary and subordinates. The Fifth Circuit held that the loss of supervisory responsibilities — even when coupled with a slight decrease in pay — did not constitute constructive discharge. *Id.* at 952.

Petitioner implicitly proposes a standard for constructive discharge under which any significant restructuring of job duties creates a claim for constructive discharge, even if the employee suffered no loss of pay. This standard would virtually handcuff employers and restrict them from even altering the job duties of anyone over forty years of age. Employers must retain the flexibility to arrange their employees' workloads. As the Third Circuit has observed, "The ADEA must not be permitted to become a mechanism to inhibit ordinary managerial decisions." *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1082 (3d Cir. 1992). Petitioner's proposed standard would not only stifle management flexibility, it would also penalize employers who humanely keep employees on salary during times of little work.

Petitioner ignores another, independent basis for the holding below. Respondent offered evidence that its human resources manager and vice president met with petitioner in March, 1994. They presented him with a written list of job duties that he would continue to perform post-computerization. They intended this action to assuage his concerns that he would not have much to do in the future. Instead, petitioner turned his back on management's attempts to define his job duties and resigned only two days after the meeting. He offered no evidence that these reassurances were an empty gesture. The court below held that petitioner had a duty to pursue internal grievance procedures before claiming constructive discharge. (Pet. App. at 6a) (citing *McKethan v. Texas Farm Bureau*, 996

F.2d 734, 741 (5th Cir. 1993), *cert. denied*, 510 U.S. 1046 (1994)). Other circuits broadly recognize that an employee who quits without giving his employer a reasonable chance to work out the problem has not been constructively discharged. *E.g.*, *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490, 494 (8th Cir. 1994); *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996) ("A constructive discharge will generally not be found if the employer is not given sufficient time to remedy the situation."). Petitioner has not challenged this holding. He certainly has not explained how it is inconsistent with the decisions of this Court or other circuits.

II.

THE OPINION BELOW DID NOT VIOLATE FIFTH CIRCUIT PRECEDENT.

Petitioner also complains the Fifth Circuit panel failed to follow its own decision in *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292 (5th Cir. 1994). The Fifth Circuit apparently does not agree: No judge in active service on the Fifth Circuit voted to rehear the case. (Pet. App. at 2a). Respondent respectfully submits that the Fifth Circuit is capable of policing its own precedent.

In any event, the decision below does not violate *Barrow*. The *Barrow* court listed seven factors it considered relevant to a determination of constructive discharge:

> (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to

> encourage the employee's resignation; or (7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not.

Id. at 297.

Petitioner apparently interprets *Barrow* to mean that evidence of any one of these factors creates a jury issue on constructive discharge. Under this interpretation, for example, a pay cut alone would support a claim for constructive discharge. This grossly misinterprets the court's decision. While the Fifth Circuit identified these factors as relevant, it did not state what combination of factors is necessary to make out a *prima facie* case of constructive discharge. Because the employee in *Barrow* offered no evidence as to any of the factors, the Fifth Circuit did not reach that question.

To the contrary, other Fifth Circuit decisions have made it clear that a bare offer of proof as to one or more of these factors does not make out a claim for constructive discharge. As discussed above, the Fifth Circuit held in *McCann* that a substantial cut in job duties, even coupled with a slight decrease in pay, does not constitute a constructive discharge. *McCann v. Litton Systems, Inc.*, 986 F.2d 946, 952 (5th Cir. 1993). Similarly, the Fifth Circuit held in *Jett* that the reassignment of an employee to other job duties does not constitute a constructive discharge. *Jett v. Dallas Ind. School Dist.*, 798 F.2d 748, 755 (5th Cir. 1986), *aff'd in part & rev'd in part on other grounds*, 491 U.S. 701 (1989). The ultimate question is always whether the employee's resignation was "reasonable under all the circumstances." *Barrow*, 10 F.3d at 297. Because the court below found that "[u]nder the particular circumstances, no reasonable employee would have felt compelled to resign," (Pet. App. at 6a), the decision below is fully consistent with *Barrow* and other Fifth Circuit precedent.

CONCLUSION

The Circuit Court of Appeals for the Fifth Circuit correctly applied the intolerable working conditions standard in deciding this case, which is the standard uniformly applied by all circuits. Since petitioner was unable to offer proof that his working conditions were intolerable where there was no change in pay, hours, benefits or title other than a mere restructuring of his job duties, the courts below correctly held that he was not constructively discharged. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KENNETH E. MILAM
Counsel of Record
WALTER J. BRAND
CHRISTOPHER B. BRADFORD
WATKINS & EAGER PLLC
Attorneys for Respondent
The Emporium Building
Suite 300
400 East Capitol Street
P.O. Box 650
Jackson, Mississippi 39205
(601) 948-6470